

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

February 26, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2008-804
Petitioner	:	A.C. No. 46-04168-142950
v.	:	
	:	
WOLF RUN MINING COMPANY,	:	Sentinel Mine
Respondent	:	

**ORDER GRANTING JOINT MOTION FOR FINAL
DECISION REGARDING CITATION NO. 6606199
AND
DECISION APPROVING SETTLEMENT FOR
CITATION NOS. 6606187 AND 6605283**

Before: Judge Feldman

I. Background

Safeguards, issued by Mine Safety and Health Administration (MSHA) inspectors pursuant to section 314(b) of the Federal Mine Health and Safety Act of 1977, as amended (“the Act”), address conditions in a particular mine that pose hazards associated with the transportation of miners and materials. 30 U.S.C. § 874(b). Section 75.1403 of the Secretary’s mandatory safety standards repeats verbatim section 314(b) of the Act. 30 C.F.R. § 75.1403. Section 75.1403-1 of the Secretary’s regulations sets forth procedures for the issuance of safeguards. 30 C.F.R. § 75.1403-1. Sections 75.1403-2 through 75.1403-11 of the regulations describe the criteria by which MSHA inspectors are to be guided in issuing and enforcing safeguards on a mine-by-mine basis. 30 C.F.R. §§ 75.1403-2 through 75.1403-11.

On June 27, 2000, the Secretary issued Notice of Safeguard No. 7095089 at the Sentinel Mine operated by Wolf Run Mining Company (“Wolf Run”). Safeguard No. 7095089 cited the criteria in section 75.1403-5(j) that requires suitable crossing facilities where persons cross over or under moving conveyor belts.

Citation No. 6606199, a subject in this proceeding, was issued at Wolf Run’s Sentinel facility on January 23, 2008. The citation alleged a violation of Safeguard No. 7095089 because a suitable crossing facility was not provided to enable miners to safely cross over a moving conveyor belt. The safeguard violation in Citation No. 6606199 affected one person, and it was designated as significant and substantial (“S&S”) based on the Secretary’s assertion that the cited condition was “reasonably likely” to contribute to an accident that would result in a serious

injury.¹ The safeguard violation was attributable to a moderate degree of negligence. The Secretary has proposed a civil penalty of \$1,304.00 for Citation No. 6606199.

II. Wolf Run's Motion

Section 104(d) of the Act specifies that only mandatory safety standards can be designated as S&S. 30 U.S.C. § 814(d)(1). Wolf Run asserts that safeguard violations citing safeguard criteria provisions cannot be designated as S&S because the safeguard criteria in sections 75.1403-2 through 75.1403-11 are not mandatory safety standards. Consequently, on November 25, 2008, Wolf Run filed a Motion for Partial Summary Decision concerning the S&S designation in Citation No. 6606199 based on its contention that neither the underlying Safeguard No. 7095089 allegedly violated, nor section 75.1403-5(j), are mandatory safety standards as contemplated by section 104(d)(1) of the Act. The Secretary filed her opposition to Wolf Run's motion on December 15, 2008.

III. Order Denying Wolf Run's Motion

On December 18, 2008, I issued an Order Denying Wolf Run's Motion for Partial Summary Decision. 30 FMSHRC 1198. As a general proposition, safeguards are "interim mandatory safety standards" under Title III of the Act. Wolf Run relies on the statutory language in section 104(d) that only mandatory safety standards can be designated as S&S. However, Wolf Run's reliance is misplaced because it fails to recognize the relevant dispositive term "mandatory safety standard" has different contextual meanings. Title I of the Act authorizes the Secretary to promulgate mandatory safety standards by means of notice and comment rulemaking proceedings. However, the statutory definition of "mandatory safety standards" in section 3(l) of the Act *includes* the "interim mandatory safety standards" in Title III. 30 U.S.C. § 802(l). Thus, safeguards may be enforced as mandatory safety standards even though they were not promulgated through a Title I rulemaking.

Specifically, the Order determined that safeguard violations, issued **after** an initial notice of safeguard has been issued, are "mandatory safety standards," as defined by the Act, that can be properly designated as significant and substantial violations. *Id.* at 1205. The Order noted that the safeguard violation in Citation No. 6606199 was issued pursuant to section 75.1403 of the regulations that repeats section 314(b) of the interim safety standards in Title III. *Id.* at 1200. Thus, Wolf Run's motion was denied based on the statutory definition of "mandatory health and safety standards" in section 3(l) that includes "interim mandatory safety standards." *Id.* at 1205.

IV. The Parties' Stipulations

¹ Generally speaking, a violation is S&S if it is reasonably likely that the hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981).

The parties now have filed a February 19, 2009, Joint Motion for Final Decision with respect to Citation No. 6606199. The parties note that Wolf Run intends to seek review of my December 18, 2008, interlocutory Order regarding the propriety of designating safeguard violations as S&S because of conflicting decisions issued by Judge Zielinski. *See Big Ridge, Inc.*, 30 FMSHRC 1172 (Nov. 24, 2008); *Cumberland Resources LP*, 30 FMSHRC 1180 (Dec. 4, 2008). In an effort to expedite the appellate process, the parties have entered into stipulations resolving the issues of the fact of the violation, the gravity of the violation, the applicability of the civil penalty criteria, and the appropriate civil penalty to be assessed for Citation No. 6606199.

Specifically, the parties stipulate that while inspecting along the No. 5 coal conveyor belt on January 23, 2008, MSHA Inspector Jeffrey Maxwell issued Citation No. 660619 after he determined that someone had crossed under the return belt that was suspended 24 inches above the mine floor. There was no belt crossover provided at this location. To terminate the citation, the Wolf Run installed an aluminum crossover at the cited location.

The parties further stipulate that the cited safeguard violation was serious in gravity, and that it was reasonably likely to contribute to a “lost work days or restricted duty” injury for one miner. The parties agree that the cited violation was attributable to a moderate degree of negligence.

With respect to the appropriate civil penalty, the parties stipulate, that Wolf Run is a large mine operator, and that the proposed penalty will not affect its ability to continue in business.

It has neither been contended nor shown that the cited violation was not abated in a timely manner, or that Wolf Run’s history of previous violations is an aggravating factor warranting an increase in the proposed penalty. Finally, the parties agree that the \$1,304.00 civil penalty proposed by the Secretary for Citation No. 6606199 is appropriate.

V. S&S Issue

Consequently, the only outstanding issue is whether Citation No. 6606199 is properly designated as significant and substantial. The case law concerning what constitutes an S&S violation is well settled. As a general proposition, a violation is properly designated as S&S if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC at 825. In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation;

(3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4; *see also Austin Power Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC at 1129, the Commission explained its *Mathies* criteria as follows:

We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Company Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984) (emphasis in original).

The Commission subsequently reasserted its prior determinations that as part of any S&S finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

Resolution of whether a particular violation of a mandatory standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC at 1130. Thus, consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986).

Having previously determined that it is appropriate to designate safeguard violations as significant and substantial, the S&S analysis focuses on whether it is reasonably likely that the hazard posed by crawling under, or climbing over, a moving beltline will result in an accident causing serious injury. Obviously, being drawn into a moving belt and its rollers is reasonably likely to result in serious or fatal injuries. Thus, the circumstances surrounding the violation, as well as the parties’ stipulation that it is reasonably likely that the hazard caused by the cited failure to provide a travelway over the beltline will result in a “lost work days or restricted duty” injury, provide a substantial basis for concluding the subject safeguard violation was properly designated as S&S. With respect to the penalty, I conclude that the parties’ agreement to impose a \$1,304.00 civil penalty is consistent with the criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i).

VI. Settlement Approval for
Citation Nos. 6606187 and 6605283

The Secretary has filed a motion to approve settlement with respect to Citation Nos. 6606187 and 6605283. A reduction in civil penalty from \$17,328.00 to \$10,000.00 is proposed for these citations. The reduction in penalty apparently is based on the vagaries of litigation. I have considered the representations and documentation submitted in this matter and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Accordingly, the parties' motion to approve their settlement terms for Citation Nos. 6606187 and 6605283 shall be granted.

ORDER

In view of the above, **IT IS ORDERED** that the safeguard violation in Citation No. 6606199 **IS AFFIRMED** as a significant and substantial violation.

IT IS FURTHER ORDERED that Wolf Run Mining Company shall pay a civil penalty of \$1,304.00 in satisfaction of Citation No. 6606199.

Consistent with the parties' settlement terms, **IT IS FURTHER ORDERED** that Wolf Run Mining Company shall pay a civil penalty of \$10,000.00 for Citation Nos. 6606187 and 6605283.

Consistent with this decision and the parties' settlement terms, **IT IS ORDERED that Wolf Run Mining Company shall, within 40 days of the date of this decision, pay a total civil penalty of \$11,304.00** in satisfaction of the three subject citations. Upon receipt of timely payment, the civil penalty proceeding in WEVA 2008-804 **IS DISMISSED.**

Jerold Feldman
Administrative Law Judge

Distribution: (Regular and Certified Mail)

R. Henry Moore, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1340,
401 Liberty Avenue, Pittsburgh, PA 15222

Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 630 East,
The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106

/rps